

- (1) The nature and extent of claimants disabilities;
- (2) The amount of claimant's average weekly wage;
- (3) Whether claimant is entitled to future medical benefits; and

- (4) Whether provisions of K.S.A. 44-501(c) bar recovery because claimant was not off work for a full week because of the injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

- (1) Claimant suffers a forty-five percent (45%) permanent partial general disability.

Claimant injured his left shoulder on November 16, 1992 while lifting a 6 x 6 block used to set up a crane. Dr. James H. Whitaker treated claimant for his injury and diagnosed a rupture of the left biceps tendon. Although he considered and discussed surgery, Dr. Whitaker did not recommend it. He found no evidence of any real weakness, impingement or restriction. He recommended shoulder range of motion exercises, anti-inflammatory medication and restricted use of the arm. As of May 26, 1993, Dr. Whitaker rated claimant's impairment as three percent (3%) permanent partial impairment of the left upper extremity. Dr. Whitaker recommended a twenty-five (25) pound weight lifting restriction but indicated this restriction was to be for one year. He recommended permanent restriction against repetitive overhead lifting in excess of fifty (50) pounds.

Claimant continued to work for respondent after the November 16, 1992 injury. He took early retirement in December 1, 1993 and testified he did so because he was not able to continue to do the work. He testified that after the injury he did not resume full duties and that co-workers helped him perform some of the heavier lifting. He testified he did not consider himself a productive employee from November 16, 1992 through December 1, 1993 and considered his performance poor during that period. He also testified that shortly before his retirement the owner had told him that if he could not pick up the 6 x 6 block, he should quit.

Because claimant returned to work at a comparable wage the presumption of no work disability found in K.S.A. 44-510e applies. Claimant argues that the presumption is overcome by the evidence related to his work restrictions and claimant's testimony that he was unable to continue to perform the duties. Claimant also relies on the evaluation performed by Dr. Prostic in August of 1994. Dr. Prostic diagnosed both a ruptured biceps tendon and significant rotator cuff tendinitis. He recommended that an MRI or arthrogram be performed to determine whether or not there is a total cuff tear. He stated that if a tear is found, surgery should be performed. Dr. Prostic stated claimant was not capable of returning to work which required lifting with the left arm weights greater than twenty-five (25) pounds on an occasional basis or ten (10) pounds on a frequent basis. He also stated claimant was not capable of work involving repetitious rotation of the left forearm or frequent use of the left hand above shoulder height. He rated claimant's impairment at twenty percent (20%) of the body as a whole.

On the basis of claimant's testimony and that of Dr. Prostic, the Appeals Board finds that the presumption is overcome. As indicated, claimant testified that he was unable to perform a portion of the duties and that he retired because he was unable to do the job. Standing alone the testimony might be suspect in light of the fact that claimant worked for a substantial period and then retired. However, Dr. Prostic's detailed description of the symptoms attributable to the ruptured biceps tendon and those attributable to the tendinitis, along with restrictions recommended by Dr. Prostic, supports claimant's testimony. The Appeals Board finds that the preponderance of the credible evidence suggests claimant developed a shoulder condition which prevented him from continuing to perform his work with respondent.

Mr. Gary Gammon testified regarding the effect of the injury on claimant's ability to access the open labor market and earn a comparable wage. He initially testified that, based on Dr. Prostic's restriction, the injury resulted in a 38.71% loss of access to the open labor market. At a second deposition, after clarification of the testimony of Dr. Whitaker, Mr. Gammon testified that the restrictions recommended by Dr. Whitaker would result in a 9.6% loss of access to the open labor market. Giving equal weight to both opinions, the Appeals Board finds claimant suffered a twenty-four percent (24%) loss of access to the open labor market.

Mr. Gammon gave only one opinion relating to loss of ability to earn a comparable wage. His opinion was based upon the eight dollars (\$8.00) per hour claimant actually earned in the post-injury job. Comparing the eight dollars (\$8.00) per hour in the post-injury job to the nine hundred twenty-three dollars and sixty-two cents (\$923.62) per week claimant earned in the pre-injury job, Mr. Gammon testified that claimant had a sixty-five percent (65%) loss of ability to earn a comparable wage.

Giving equal weight to the loss of ability to earn a comparable wage and loss of ability to obtain and retain employment in the open labor market, the Appeals Board finds claimant has a forty-five percent (45%) permanent partial general disability.

The Appeals Board finds, however, that claimant should not be entitled to the work disability of forty-five percent (45%) during the time he was working for respondent at a comparable wage, i.e., from November 16, 1992 to December 1, 1993. During the period his benefits shall be based on functional impairment which the Appeals Board finds to be twenty percent (20%) based upon the only whole body rating in the record, the rating by Dr. Prostic.

(2) Claimant's average weekly wage was nine hundred thirteen dollars and eighty-two cents (\$913.82), once fringe benefits terminated. Claimant argues that the Administrative Law Judge erred in determining the average weekly wage. The Administrative Law Judge used seven hundred ten dollars and thirty-two cents (\$710.32), which represented the base wage plus overtime. He did not add fringe benefits apparently, in part, because claimant retired. K.S.A. 44-511 requires the addition of listed fringe benefits in calculating the average weekly wage in any case where those fringe benefits have been terminated. The statute does not distinguish based upon the reason for termination. The parties have agreed that the fringe benefits have a weekly value of two hundred three dollars and fifty cents (\$203.50). The Appeals Board, therefore, finds that from and after December 1, 1993 the average weekly wage was nine hundred thirteen dollars and eighty-two cents (\$913.82). For benefits during the period November 19, 1991 to December 1, 1993, the average weekly wage should be seven hundred ten dollars and thirty-two cents (\$710.32).

(3) The Administrative Law Judge denied the request for future medical benefits. Based upon the testimony of Dr. Prostic, the Appeals Board finds future medical benefits should be awarded upon proper application to and approval by the Director.

(4) Respondent argues that claimant should be barred from recovery of any benefits on the basis of the language in K.S.A. 44-501(c) because claimant did not miss time from work. The Appeals Board considered the same issue in the case of Robert Boucher v. Peerless Products, Inc., Docket Number 184,576 (April 1995). For the reasons therein stated, the Appeals Board concludes that the fact that claimant was not off of work for a period of one week does not preclude recovery of permanent partial disability or other benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 4, 1995 should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS for an accidental injury that occurred on November 16, 1992 in favor of the claimant Archie E. Capps, and against the respondent, Haggard Hauling & Rigging, and its insurance carrier, CNA Insurance Company as follows:

Claimant is entitled to 53.86 weeks of benefits at the rate of \$94.71 per week for a 20% permanent partial general disability based on an average weekly wage of \$710.32 during the period of November 19, 1992 through December 1, 1993, or \$5,101.08. Thereafter, claimant is entitled to 361.14 weeks of benefits at the rate of \$274.16 per week for a 45% disability based on an average weekly wage of \$913.82 or until payments reach the maximum of \$100,000.00.

As of January 31, 1996 there is due and owing 53.86 weeks at \$94.71, or \$5,101.08, and 113.57 weeks at \$274.16 per week or \$31,136.35 for a total of \$36,237.43, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$63,762.57 is to be paid for 247.57 weeks at the rate of \$274.16 per week until fully paid or further order of the Director.

Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 is also awarded to the claimant.

Costs of transcripts in the record are taxed against respondent and its insurance carrier as follows:

Richard Kupper & Associates	\$377.00
Metropolitan Court Reporters, Inc.	\$1,069.10
Gene Dolginoff Associates, Ltd.	\$1,008.60

As agreed, the Kansas Workers Compensation Fund should pay 25% of the award and costs.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Burkhead, Mission, Kansas
Anton C. Andersen, Kansas City, Kansas
Derek R. Chappell, Ottawa, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director